

Bringing the Troops Home to a Disaster: Law, Order, and Humanitarian Relief

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Catastrophic disasters require federal and state entities to marshal a tremendous amount of resources. Areas affected by such disasters need food, water, medicine, and shelter. Often, they also need heightened security. While these tasks differ in principle, they are much harder to separate in practice. Currently, members of the military may provide disaster relief but they generally cannot enforce laws in disaster stricken areas. This division of labor makes sense only where states are able to handle the disruption by the normal operation of law. But where a disaster threatens to overwhelm state resources, states should be able to request military law enforcement as part of the disaster relief effort. As such, the argument is not about expanding the military's domestic powers, but about reorganizing some of its current powers under the rubric of disaster relief.

I. INTRODUCTION

After Hurricane Katrina made landfall on August 29, 2005, another storm began to form as the public grew frustrated with the apparent inability of the government to offer disaster relief.¹ The scale of the damage caused in Louisiana and Mississippi was unprecedented in recent times but by no means unanticipated, as government agencies had predicted the potential of such natural disasters via computer models.² Thus, images of hurricane victims stranded without food, water, and medical care nearly a week after the first day of the storm shocked many viewers. Reports of random violence and images of looting further stoked public outrage. Seemingly, the only branch of government that garnered praise was the military. In one poll, General Russel Honore, the commander in charge of the Joint Task Force, was voted by far the most effective government figure to emerge from the disaster response effort.³

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¹ Manuel Roig-Franzia & Spencer Hsu, *Many Evacuated, but Thousands Still Waiting*, WASH. POST, Sept. 4, 2005, at A1.

² Eric Lipton, *White House Was Told Hurricane Posed Danger*, N.Y. TIMES, Jan. 24, 2006, at A14; *Computer Models Predicted Disaster: New Orleans Scenario 'Well Anticipated,' Experts Say, So What Happened?*, MSNBC.COM, Sept. 2, 2005, <http://www.msnbc.msn.com/id/9175204>.

³ Op-Ed., *Posse Comitatus*, S.D. UNION-TRIB., Sept. 26, 2005, at B6.

In the aftermath of Hurricane Katrina and the public outcry, the President and some in his administration suggested that a broader role for the military might be needed in the future to cope more effectively with large-scale disasters. George W. Bush declared that “a challenge on this scale requires greater federal authority and a broader role for the armed forces—the institution of our government most capable of massive logistical operations on a moment’s notice.”⁴ Members of Congress have also declared their interest in giving the armed forces a greater role in dealing with natural and human-made disasters.⁵ The push for a larger domestic role for the military persists even though some commentators doubt its necessity. One common observation is that nothing in federal law prevents the chief executive from effectively deploying the military in case of a domestic disaster.⁶

This Note addresses the current debate about whether further liberalization of laws governing the domestic use of the military is necessary to ensure more effective disaster response. It argues that although the various laws and regulations could be read to allow the President full use of armed forces to respond to a disaster, the hodgepodge manner of achieving this result is not very helpful to disaster responders or victims. The Note also goes on to suggest a legislative solution largely unexplored by authors discussing the role of the military in domestic affairs.

Part II sets out the general rule against military involvement in domestic affairs contained in the Posse Comitatus Act and gives the rationale for excluding the military from civilian life. Following this are relevant judicial interpretations of the restrictive statute and some exceptions to the restrictions.

Part III introduces the Stafford Act, which provides for military assistance in domestic disasters. After introducing the Stafford Act, this Part discusses two important aspects of disaster response: the status of the National Guard and the state-triggered provisions of the Stafford Act. Part IV examines the challenges of applying the Posse Comitatus Act in disasters requiring military personnel under the Stafford Act. It concludes that the appropriate legislative response to Hurricane Katrina is more clarity in the law governing military assistance, not more power to the military. While lack

⁴ George W. Bush, President Discusses Hurricane Relief in Address to the Nation (Sept. 15, 2005), <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html#>; Julian E. Barnes & Kenneth T. Walsh, *A Uniform Response?*, U.S. NEWS & WORLD REP., Oct. 3, 2005, at 28; G. Robert Hillman, *Military Seeks National Plan for Disasters*, DALLAS MORNING NEWS, Sept. 26, 2005, at 1A.

⁵ Letter from Sen. John Warner, Chairman, Armed Forces Comm., to Donald Rumsfeld, Secretary of Defense (Sept. 14, 2005) (on file with author) (urging greater role for the military in large-scale disasters).

⁶ John Yoo, *Trigger Power*, L.A. TIMES, Oct. 2, 2005, at M5.

of power does not appear to be the problem, disaster relief presents challenges not adequately addressed by the current law. Although some authors have observed that the Stafford Act contains no exceptions to the Posse Comitatus Act, and others have incorrectly called the Stafford Act an exception, the next section discusses the possibility of law and order as disaster relief. Part V argues that incorporating exceptions to the Posse Comitatus Act into the Stafford Act, the principle disaster relief statute, would help clarify this area of law for both the military and civilians.

II. THE LAW GOVERNING DOMESTIC USE OF THE MILITARY

In 1878, Congress enacted the Posse Comitatus Act (PCA), a law that presently criminalizes military law enforcement. Any legislative attempts to involve the military in domestic affairs today must factor this prohibition into its regulative framework.⁷ The following section introduces the statutory

⁷ See, for example, 6 U.S.C. § 466(a)–(b) (Supp. III 2003), which provide the framework for Homeland Security:

(1) Section 1385 of title 18 (commonly known as the “Posse Comitatus Act”) prohibits the use of the Armed Forces as a posse comitatus to execute the laws except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.

(2) Enacted in 1878, the Posse Comitatus Act was expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing Federal law.

(3) The Posse Comitatus Act has served the Nation well in limiting the use of the Armed Forces to enforce the law.

(4) Nevertheless, by its express terms, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President’s obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency.

(5) Existing laws, including chapter 15 of title 10 (commonly known as the “Insurrection Act”), and the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), grant the President broad powers that may be invoked in the event of domestic emergencies, including an attack against the Nation using weapons of mass destruction, and these laws specifically authorize the President to use the Armed Forces to help restore public order.

(b) Sense of Congress

Congress reaffirms the continued importance of section 1385 of title 18, and it is the sense of Congress that nothing in this chapter should be construed to alter the

language of this provision, its subsequent interpretation by the courts, and some exceptions to the rule. Within the exceptions, which vary in scope, this Note identifies a common and commonsensical thread of permitting military law enforcement to the extent necessary to preserve certain constitutional rights, to protect property, and to save life. Necessity in this context indicates the failure or inability of state and local authorities to provide these functions.

A. *Posse Comitatus Act*

Conceptually, the law governing the domestic use of the military for any purpose begins with the PCA.⁸ The term “posse comitatus” literally means the power of the county, or that population of the county whom a sheriff may summon for assistance.⁹ Although the PCA only mentions the Army and Air Force, Department of Defense regulations apply the PCA to the Navy and Marines.¹⁰ According to its placement in the United States Code, the PCA is a criminal statute, but no one has ever been convicted of violating the law.¹¹ Instead, the PCA has come to codify a general principle against the domestic use of the military to carry out civilian laws. In this way, the PCA is said to establish civilian supremacy over the military. This clear division of labor is not always supported by actual practice, but because the statute specifically provides for Congress to create exceptions, Congress has not felt obliged to change the PCA.¹²

applicability of such section to any use of the Armed Forces as a posse comitatus to execute the laws.

⁸ The Posse Comitatus Act provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385 (2000).

⁹ BLACK’S LAW DICTIONARY 1200 (8th ed. 2004) (“A group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations.”).

¹⁰ DEP’T OF DEFENSE, DIRECTIVE 5552.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS para. E4.3 (1986), available at http://www.fas.org/irp/doddir/dod/d5525_5.pdf [hereinafter DOD DIRECTIVE 5525.5].

¹¹ DONALD J. CURRIER, THE POSSE COMITATUS ACT: A HARMLESS RELIC FROM THE POST-RECONSTRUCTION ERA OR A LEGAL IMPEDIMENT TO TRANSFORMATION? 15, 24 (2003), available at <http://handle.dtic.mil/100.2/ADA417183>.

¹² Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 955, 969–70 (1997). But see H.R. 4240, 109th Cong. § 5 (1st Sess. 2005) (allowing the military to enforce the law “at or near a border of the

While the wording of the PCA remains essentially identical to the original, its relevance has varied over time.¹³ The PCA's inconsistent application is a direct result of the tradeoffs inherent in the domestic use of the military. On one hand, the discipline and efficiency of federal troops renders the military an attractive option in many domestic situations.¹⁴ In other respects, engaging civilians with troops trained to fight enemies raises serious questions for civilians and the military.¹⁵ The PCA's continued relevance owes to the questions raised by and the need for recurrent involvement of the military in domestic affairs. These tensions, always present in the debate about domestic military use, were anticipated by events surrounding the passage of the Act.

1. Background

The politics and problems of the post-Reconstruction Era provided much of the impetus for the enactment of the Posse Comitatus Act.¹⁶ After the Civil War and prior to the PCA, federal troops remained in the South to safeguard elections, enforce the voting rights of former slaves, and maintain general order.¹⁷ Even after the military officially pulled out, the army was repeatedly used throughout the South to maintain peace and order among warring political parties and to watch over elections.¹⁸ Southern Democrats especially resented the presence of troops under a Republican administration.¹⁹ Although other members of Congress showed concern over the heavy reliance on the Army for extended periods, the Act did not pass until the

United States in order to prevent aliens not permitted by law to enter the United States, terrorists, and drug smugglers from entering the United States").

¹³ See *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948) (commenting on the PCA as an "obscure and all-but-forgotten statute"); Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL'Y 99, 99–100 (2003) (highlighting some of the inconsistent attitudes towards the PCA).

¹⁴ See ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878*, 268–87 (1988).

¹⁵ *Id.* at 143.

¹⁶ The First Circuit went so far as to call the Act a "backwash of the Reconstruction period." *Chandler*, 171 F.2d at 936. For a fuller discussion of the PCA's contested past, see James P. O'Shaughnessy, Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AM. CRIM. L. REV. 703 (1976); see also Bonnie Baker, *The Origins of the Posse Comitatus Act*, in *THE POSSE COMITATUS ACT AND RELATED MATTERS: CURRENT ISSUES AND BACKGROUND* 1, 1–6 (Susan Boriotti & Donna Dennis eds., 2004) (discussing relevant legislative history).

¹⁷ COAKLEY, *supra* note 14, at 268–87.

¹⁸ CURRIER, *supra* note 11, at 4–6 (describing the Reconstruction Era experience of Louisiana, Arkansas, and South Carolina).

¹⁹ *Id.*

constitutional and congressional power to override its restrictions was made explicit.²⁰

Additionally, before the PCA, U.S. Marshals across the country had the power to summon army members in their territory to arrest criminals and carry out other law enforcement activities.²¹ This practice grew out of a 1789 law authorizing marshals to organize and lead militias to enforce civil laws. Somewhat awkwardly, it was justified by the argument that soldiers called to police civilians were called as citizens, not as soldiers, even if on active duty at the time.²² Both military personnel and civilians came to disapprove of using active-duty soldiers in this way, especially when marshals began to enforce fugitive slave laws in non-slave holding states.²³

The Posse Comitatus Act was the culmination of these varied and often directly opposed forces and interests.²⁴ Proponents of liberalizing the application of the PCA point out the limited nature of the PCA's origins to suggest narrowing its current scope. In particular, they note the ignoble and discriminatory intentions behind the desire to ban federal troops from enforcing civil laws. Even then, some commentators argue that the PCA merely codified the resistance of civilians to what effectively amounted to martial law.²⁵ Those who believe the PCA should be strictly enforced see the Act as quasi-constitutional, the codification of a long history of American opposition to overbearing centralized governments, and a central tenet of democratic federalism.²⁶

2. *Evolving Rationale*

Regardless of where one traces the roots of the PCA, three reasons help to explain its continued relevance. Perhaps the best-known rationale is the

²⁰ *Id.* at 5.

²¹ Charles Doyle, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, in *THE POSSE COMITATUS ACT AND RELATED MATTERS: CURRENT ISSUES AND BACKGROUND* 17, 24 (Susan Boriotti & Donna Dennis eds., 2004).

²² *Id.*

²³ COAKLEY, *supra* note 14, at 343.

²⁴ Sean J. O'Hara, Comment, *The Posse Comitatus Act Applied to the Prosecution of Civilians*, 53 U. KAN. L. REV. 767, 770–71 (2005). The PCA reversed trends towards more liberal use of the military, so its historical roots have also been traced back even further to the Revolutionary Period. See, e.g., Hammond, *supra* note 12, at 956.

²⁵ See CURRIER, *supra* note 11, at 1.

²⁶ See generally Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 341–47, 392 (1994) (warning about the use of the military for “quixotic” domestic security).

fear of forfeiting civil liberties to a powerful centralized government, a rationale based partly on federalism and partly on a general distrust of a militarized society.²⁷ Because the military is a branch of the federal government, and perceives itself as an institution insulated from the political process, it sits twice removed from the local concerns and sensitivities of citizens. Therefore, it has traditionally been seen as less amenable and responsive to those concerns. Civil liberties are thus entrusted to civilian leaders who must remain supreme to the military. By removing the military from law enforcement, the PCA is said to maintain civilian control over the military.²⁸

Another rationale for the PCA is that it preserves the military's scarce resources. As an institution, the military must be protected from spreading itself too thin.²⁹ Precisely because the military is so organized and effective, politicians and other authorities are tempted to use it for many purposes.³⁰ Even where this is politically expedient, the military is not always eager to expand its role. With regard to missions abroad, military commanders may be reluctant to take on certain operations, but legal restrictions usually do not prevent them from undertaking the operation. At home, the PCA may pose a legal obstacle to policy makers wishing to commit the military to a particular course of action, and many inside and outside the military view this potential obstacle as an energy and resource saving device.³¹

Lastly, the PCA recognizes the limits of military training and seeks to prevent confusing combat-trained troops by placing them in essentially policing functions.³² Soldiers train to engage enemies, not citizens with established constitutional rights to due process, reasonable searches and seizures, as well as other constitutional safeguards. Moreover, the violence necessary against enemies may be counterproductive in addition to being

²⁷ See, e.g., Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 400, 442 (2003).

²⁸ *Bissonette v. Haig*, 776 F.2d 1384, 1387 (8th Cir. 1985), *rev'd on reh'g*, 800 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988); Dunlap, *supra* note 26, at 343-44.

²⁹ See Michael T. Cunningham, *The Military's Involvement in Law Enforcement: The Threat is Not What You Think*, 26 SEATTLE U. L. REV. 699, 711-14 (2003). For the author, the promise of politicians to refrain from adversely affecting the primary task of the military by more non-traditional missions ignores reality. *Id.* at 711.

³⁰ *Id.*

³¹ Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 MIL. L. REV. 86, 149 (2003); CURRIER, *supra* note 11, at 11.

³² Kealy, *supra* note 27, at 429, 441.

dangerous in the context of civilians.³³ Those trained to police civilians are taught to use force gradually and to produce admissible evidence. For soldiers trained to search and destroy, the demands of gathering and preserving such evidence may not always be apparent. It is also noteworthy that some in the military frown on "soft missions" exactly because such missions require the military to deemphasize its war-fighting capacity, out of the fear that it would somehow soften the troops or confuse their training.³⁴

B. Interpretation of the Posse Comitatus Act

The three rationales for the PCA appear to warrant a broad construction, but courts have not been as expansive.³⁵ Although courts have not convicted anyone for violating the PCA, they have found violations of the statute to defeat government claims in which the lawful exercise of power constituted an element of the offense.³⁶ To determine whether there has been a violation, courts must first decide whom the PCA prohibits, as the statutory language only mentions the Army and the Air Force; however, Department of Defense regulations apply the PCA's restrictions to the Navy and the Marine Corps.³⁷

³³ See, e.g., Jesse Katz, *A Good Shepherd's Death*, L.A. TIMES, June 21, 1997, at A1 (reporting on the accidental death of a shepherd along the U.S.-Mexico border). Lawrence Korb, former Assistant Secretary of Defense, is quoted as saying the military "is trained to vaporize, not Mirandize." Douglas Holt, *DA Questions Military Account of Border Slaying; Drug Unit Spokeswoman Calls Remarks Surprising*, DALLAS MORNING NEWS, June 4, 1997, at 1A. In a debate after Hurricane Katrina, Korb took the position of giving the military a greater role in major disasters. *The NewsHour with Jim Lehrer: Send in the Military* (PBS television broadcast Sept. 27, 2005). Importantly, Korb explained his original comment related to border patrol and not catastrophic disasters, and that military personnel could be trained accordingly. *Id.*

³⁴ William C. Banks, *The Normalization of Homeland Security After September 11: The Role of the Military in Counterterrorism Preparedness and Response*, 64 LA. L. REV. 735, 771 (2004) (describing why military commanders might balk at the idea of police training for soldiers); Cunningham, *supra* note 29, at 714.

³⁵ See H.R. REP. NO. 97-71, pt. 2, at 5 (1981), as reprinted in 1981 U.S.C.C.A.N. 1781, 1787 ("[N]o one has been charged or prosecuted under the Posse Comitatus Act since its enactment.").

³⁶ See, e.g., *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961) (denying a claim against the government because an Air Force pilot in violation of the PCA was outside the scope of his employment at the time he injured a bystander).

³⁷ DOD DIRECTIVE 5525.5, *supra* note 10, para. E4.3. Because restrictions on the Navy and the Marines are more or less self-imposed, the Secretary of the Navy may waive the restrictions on a "case-by-case basis." *Id.* Hammond, *supra* note 12, at 982-83, calls for an end to this strange division between regulatory and statutory coverage. The Coast Guard generally functions without the restrictions of the PCA and has broad law enforcement roles. See 14 U.S.C. § 2 (2000).

Thus, the PCA applies to any four of these branches. Absent constitutional or statutory exceptions, active-duty forces may not “execute the laws,” language that courts have interpreted to bar military activities considered law enforcement. However, this prohibition on law enforcement does not ban military assistance in general. To determine what forms of military assistance constitute execution of the law, courts developed three tests. The best-known articulation of these tests comes from the Wounded Knee cases—three related cases in which the government sought to refute defendants’ allegations that officers had not lawfully seized them.

In the first of the three cases, *United States v. Jaramillo*, defendants occupied a Native American community as part of a liberation movement.³⁸ Members of the group eventually surrendered, but introduced evidence at trial of Army assistance, namely, equipping and providing logistical support to FBI agents and other law enforcement officials.³⁹ Additionally, Army officials had instructed law enforcement officials on civil disorder tactics after initially being dispatched to determine whether federal troops might be necessary.⁴⁰ The District Court ruled that equipment provisions by the Army did not violate the PCA.⁴¹ As for the logistical support and tactical advice, the issue turned on whether their activities pervaded that of civilian authorities.⁴² The Court, while not reaching the ultimate question, noted that a reasonable trier of fact could conclude Army personnel had controlled the operation in a manner that effectively pervaded the activities of law enforcement officials, even though they merely advised the proper authorities.⁴³ For the court in *Jaramillo*, military presence that directly influenced the decisions of law enforcement officials would have been a violation of the PCA.⁴⁴

The next of the Wounded Knee cases presented essentially the same question, yet in *United States v. Red Feather* the court used a more permissive test to determine what activities rose to the level of law

³⁸ *United States v. Jaramillo*, 380 F. Supp. 1375, 1376 (D. Neb. 1974).

³⁹ *Id.* at 1378–79. Because the prosecution had to prove that exercise of authority by government officials was lawful, a violation of the PCA would have defeated the element of lawfulness. *Id.* at 1376.

⁴⁰ *Id.* at 1379–80.

⁴¹ *Id.* at 1379. The sharing of equipment did not violate the Act because nothing in the statute or legislative history indicated Congress sought to stem such behavior; in fact, there was evidence that Congress clearly supported equipment sharing, and the statute said nothing to the contrary. *Id.*

⁴² *Id.*

⁴³ *Id.* at 1381.

⁴⁴ *Jaramillo*, 380 F. Supp. at 1380. *But see* *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1976) (criticizing this holding as too vague in application).

enforcement.⁴⁵ With regard to equipment sharing, both courts deemed such assistance permissible.⁴⁶ As for the advice given by military personnel, the court in *Red Feather* took a different approach. While the court in *Jaramillo* held that advice could rise to the level of enforcement, the *Red Feather* court focused primarily on the distinction between passive support and direct assistance. Direct assistance in this formulation requires things like actual operation of equipment and involvement in the activities of law enforcement officials.

Somewhat similar to *Red Feather*, in *United States v. McArthur*, the court also held that the PCA only barred active or actual involvement in enforcing domestic laws.⁴⁷ In the words of the court, the PCA prohibited the military from exercising power that "was regulatory, proscriptive, or compulsory in nature."⁴⁸ In this regard, only those activities commonly associated with police force, like searches and seizure are likely to violate the PCA.⁴⁹

C. Constitutional and Statutory Exceptions

The Posse Comitatus Act prohibits the military from assuming an active role in domestic law enforcement unless the exceptions specifically mentioned in the Act apply. These exceptions remove the prohibition on active and direct enforcement of the law "in cases and under circumstances expressly authorized by the Constitution," or by an "Act of Congress."⁵⁰ Today, the exceptions granted by these two sources allow the military to take

⁴⁵ *United States v. Red Feather*, 392 F. Supp. 916, 920-23 (D.S.D 1975).

⁴⁶ *Id.* at 923.

⁴⁷ *McArthur*, 419 F. Supp. at 194. Both *McArthur* and *Red Feather* were appealed and consolidated in *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976). The court in *Casper* affirmed the holding and reasoning of both cases without parsing the language, although it cited the *McArthur* court more heavily. *Casper*, 541 F.2d at 1275-76, 1278.

⁴⁸ *McArthur*, 419 F. Supp. at 194. Moreover, this exercise of force must cause "citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority." *Id.*

⁴⁹ *Bissonette v. Haig*, 776 F.2d 1384, 1390-91, 1392 (8th Cir. 1985) (refusing to dismiss a claim that the government violated the PCA because plaintiffs stated a claim by alleging members of the armed forces set up roadblocks and conducted patrols). *Cf.* *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (transport of suspected hijacker by Navy did not violate the PCA because Navy did not participate in the actual arrest, search, or seizure). This line of interpretation has been criticized by commentators as undermining the rule. *See, e.g.,* Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 109, 116 (1994).

⁵⁰ 18 U.S.C. § 1385 (2000).

part in a wide variety of direct and active law enforcement activities.⁵¹ In recent times, the military has been used to enforce civil rights, stop looting, and restore law and order after riots and disasters.⁵² Currently, Congress is considering a categorical exception to the PCA for the purpose of preventing illegal immigration.⁵³ Although the PCA remains almost unchanged from its enactment in 1878, the various exceptions to the law raised the suspicions of those concerned with consequent threats to civil liberties,⁵⁴ but they also provided opponents an opportunity to advocate for a legislative *coup de grâce*.⁵⁵ Whatever the merits of both criticisms regarding the PCA, it is important to note the exceptions to the statute in general, and in the event of a disaster. This Note proposes that, in a disaster, these general exceptions could be pieced together to provide military commanders the legal authority

⁵¹ 25 U.S.C. § 180 (2000) (removal of persons illegally occupying Native American lands); 16 U.S.C. § 593 (2000) (timber protection in Florida); 42 U.S.C. § 97 (2000) (enforcement of quarantine and health laws); 43 U.S.C. § 1065 (2000) (removal of unlawful enclosures from public lands); 18 U.S.C. § 351 (2000) (enforcement assistance in crimes against members of Congress); 16 U.S.C. § 23 (2000) (protection for parks); 16 U.S.C. § 1861(a) (2000) (enforcement of the Fishery Conservation and Management Act of 1976); 18 U.S.C. § 831 (2000) (assistance without regard to the PCA in crimes involving nuclear material); 42 U.S.C. § 1989 (2000) (implementing warrants to enforce specified civil rights); 48 U.S.C. § 1591 (2000) (support for authorities in the Virgin Islands and Guam); 18 U.S.C. § 112 (2000) (enforcement of crimes against foreign officials, official guests, and internationally protected persons); 50 U.S.C. § 220 (2000) (support for certain customs laws).

⁵² Sydney J. Freedberg, Jr., *Posse Comitatus: Tiny Law, Big Impact*, NAT'L J., Nov. 12, 2005, at 3557.

⁵³ See H.R. 4240, 109th Cong. § 5 (1st Sess. 2005).

In General—Section 1385 of title 18, United States Code, is amended by inserting after 'execute the laws' the following: 'other than at or near a border of the United States in order to prevent aliens not permitted by law to enter the United States, terrorists, and drug smugglers from entering the United States.'

Id. Unlike the other exceptions, which are found elsewhere in the Code, this provision would substantively revise the language of the Posse Comitatus Act.

⁵⁴ Harry Levins, *Loopholes in Law Give Military Ability to Play Role in U.S.*, ST. LOUIS POST-DISPATCH, Apr. 21, 2002, at B6; Eugene R. Fidell, *Think Again Before Relaxing Posse Act*, BOSTON GLOBE, Aug. 3, 2002, at A15.

⁵⁵ See John R. Brinkerhoff, *The Posse Comitatus Act and Homeland Security*, J. HOMELAND SECURITY, Feb. 2002, available at <http://www.homelandsecurity.org/journal/articles/brinkerhoffpossecomitatus.htm>; Ann Roosevelt, *Experts Debate Possible Police Role For Military*, NAVY NEWS & UNDERSEA TECH., Feb. 4, 2002, at 3; Derek Reveron, *Katrina's Call*, NAT'L REV. ONLINE, Oct. 20, 2005, <http://www.nationalreview.com/comment/reveron200510200822.asp>.

to act, including the authority to enforce the law,⁵⁶ if the conditions called for such action; that is, if a disaster made it necessary for the military to save life and property.

1. *Insurrection Act*

The boldest and least circumspect exception to the PCA is the Insurrection Act, under which the President may command any branch of the armed forces to quell insurrections, uprisings, and civil disturbances threatening the operation of state or federal laws, with or without the request of state authorities.⁵⁷ The Insurrection Act contains three main provisions for military law enforcement, of which only § 331 requires a Governor's

⁵⁶ Nonetheless, piecing together various exceptions is not optimal. *See infra* Parts IV, V.

⁵⁷ 10 U.S.C.S. §§ 331–335 (2006). The statute provides, in relevant parts, that:

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

Id. § 331.

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

Id. § 332.

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

Id. § 333.

invitation. Sections 331 and 332 provide for military use by the President to safeguard the operation of federal law and functions, whereas § 333 works to safeguard the operation of state as well as federal laws.⁵⁸

Nothing in the Insurrection Act defines such terms as “insurrection” or “domestic violence.”⁵⁹ However, agency regulations promulgated by the Department of Defense define civil disturbance as “group acts of violence and disorders prejudicial to public law and order,” although the term civil disturbance is not found in the statute.⁶⁰ Case law indicates that the statute gives the President a great deal of discretionary power in determining whether domestic unrest or violence warrants military intervention.⁶¹ The Act also emphasizes that the exercise of this discretion rests in the duty of the federal government to serve as a last resort.⁶² Otherwise, the regulations reiterate that states generally protect life and property and maintain order.⁶³ However, nothing in the regulations requires states to have actually exhausted their resources before looking elsewhere. If emerging conditions appear to surpass state and local capacity, federal assistance under the Insurrection Act is appropriate.⁶⁴

In any event, the actual relationship of federal and state power has been, at least in recent memory, far less complicated than the statute, which raises thorny questions about the balance between state power and the inherent right of the President to uphold the rule of law under the Constitution. The

⁵⁸ *Id.* More specifically, § 333 empowers the President to enforce the rights and protections of citizens under the Constitution even against state resistance. Notably, under § 333 the state is said to have denied its residents the equal protection of the law. 10 U.S.C. § 333 (2000). Thus, although the general welfare of the public is entrusted to the states, and the statute lets states decide when they need federal support, if constitutional rights and protections or federal laws and property are at stake, the President may act without the governor’s request. 32 C.F.R. § 215.4 (2005).

⁵⁹ Strictly interpreted, insurrection would mean violence intended to “overthrow a lawfully constituted regime.” *Pan Am. World Airways v. Aetna*, 505 F.2d 989, 1005 (2d Cir. 1974). But other courts note that the term may also mean an outbreak of civil disturbance or defiance of laws. *See, e.g., Home Ins. Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954). In any case, the Insurrection Act also uses terms such as “domestic violence” and “unlawful combinations,” language geared more towards riots and civil disorder than insurrection and rebellion, which focus more on threats to the legitimacy of governments at the federal or state level.

⁶⁰ 32 C.F.R. § 215.3(a) (2005). Somewhat unhelpfully, the regulations define civil disturbance as any domestic condition requiring federal intervention. *Id.*

⁶¹ *See Bergman v. United States*, 565 F. Supp. 1353, 1402 (W.D. Mich. 1983) (discussing the decision-making of presidents invoking the Insurrection Act).

⁶² 32 C.F.R. § 501.1(a) (2006). For examples of “last resort,” see *infra* note 125.

⁶³ *Id.*

⁶⁴ *Id.*

Insurrection Act was invoked in 1989 after reports of mass looting in St. Croix following Hurricane Hugo,⁶⁵ and again in 1992 when riots broke out in Los Angeles.⁶⁶ On both occasions, requests for law and order assistance came from the respective local and state officials and preceded the President's invocation of the Act.⁶⁷ Only in response to state refusal to enforce the civil rights of African-Americans has the President invoked the Act without state invitation.⁶⁸ Thus, while a state request is not legally necessary,⁶⁹ recent experience seems to suggest such a request would be expected unless a President deems state authorities to be acting in bad faith.⁷⁰

2. Other Statutes

Aside from the Insurrection Act, federal statutes contain a host of specifically targeted provisions for direct and active military participation in the enforcement of domestic laws.⁷¹ One that might be relevant in a discussion of the PCA and disasters provides for broad military assistance to civilian law enforcement.⁷² Although that statute generally restricts the military from directly participating in searches, seizures, and arrests, it permits extensive use of military equipment, advice, and personnel for law enforcement purposes.⁷³ The only provision allowing for active military law enforcement deals with emergencies involving chemical or biological weapons of mass destruction in which the military's participation is "necessary for the immediate protection of human life, and civilian law

⁶⁵ Jeffrey Schmalz, *Troops Find Looting and Devastation on St. Croix*, N.Y. TIMES, Sept. 22, 1989, at A22.

⁶⁶ Eric Lipton, Eric Schmitt & Thom Shanker, *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1.

⁶⁷ *Id.*

⁶⁸ *Id.*; *Bergman v. United States*, 565 F. Supp. 1353, 1401–02 (W.D. Mich. 1983) (describing use of the Insurrection Act to enforce civil rights by Presidents Grant and Kennedy); see also Nicholas Lemann, *Insurrection*, NEW YORKER, Sept. 26, 2005, at 67 (pointing out the racial component of past invocations of the Insurrection Act). This legacy of states acting in bad faith remains tied to the Insurrection Act, a factor discussed below in Part IV.C.

⁶⁹ See *Bergman*, 565 F. Supp. at 1402 (W.D. Mich. 1983) (noting the Insurrection Act can be invoked without state consent or invitation).

⁷⁰ Lipton et al., *supra* note 66 (describing how these worries influenced the decisions of executive branch officials after Hurricane Katrina).

⁷¹ See *supra* note 51 and accompanying text.

⁷² 10 U.S.C. §§ 371–382 (2000) (providing for military assistance to civilian law enforcement in activities such as drug interdictions and terrorism).

⁷³ *Id.* § 374.

enforcement officials are not capable of taking the action.”⁷⁴ While this statutory scheme codifies the Wounded Knee cases by allowing for extensive passive or non-coercive support to law enforcement officials,⁷⁵ it reinforces the notion that the PCA is more concerned with military involvement in routine police activities, in which states presumably possess the capacity to enforce the law. When an emergency would reasonably be expected to overwhelm or succeed in overwhelming the resources of any given state, the policy concerns underlying the PCA hold less force. This logic runs throughout the other types of exceptions below.

3. *Constitutional Exceptions*

The PCA does not apply “in cases and under circumstances expressly authorized by the Constitution.”⁷⁶ Interpreting this particular clause often leads commentators to invoke legislative history rather than its plain language because of problematic constitutional questions raised by the express-grant clause.⁷⁷ Historically, the clause was most likely a face-saving compromise to appease legislators who believed the Constitution expressly granted the President the power to use the military to execute domestic laws.⁷⁸ For legislators who saw no such express grant, the clause added nothing to the statute.⁷⁹ The Constitution states that the President, as the Commander in Chief of the armed forces, “shall take Care that the Laws be faithfully executed.”⁸⁰ It also guarantees states the protection of the federal

⁷⁴ *Id.* § 382(d)(2)(B)(i).

⁷⁵ See *supra* notes 38–49 and accompanying text.

⁷⁶ 18 U.S.C. § 1385 (2005).

⁷⁷ See Doyle, *supra* note 21, at 34–36. There are two issues contained in the constitutional question: first, whether the Constitution expressly grants the executive branch power to enforce the law with military forces; second, if the Constitution contains no express grant, to what extent may Congress restrict any implied power said to exist. *Id.*; Compare Note, *Honored in the Breach: Presidential Authority to Execute the Laws with Military Force*, 83 YALE L.J. 130, 143–44 (1973) (no express grant and no power to utilize military law enforcement without congressional authority), with H.W. Furhman, *Restrictions upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 91–92 (1960) (no express grant necessary for the exercise of President’s implied power to resort to military law enforcement). No court has addressed the specific question of whether the constitutional exception includes the President’s inherent powers. Doyle, *supra* note 21, at 37.

⁷⁸ Doyle, *supra* note 21, at 34.

⁷⁹ James P. O’Shaughnessy, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AM. CRIM. L. REV. 703, 712 (1976).

⁸⁰ U.S. CONST. art. II, § 3 cl. 3.

government against domestic violence.⁸¹ What exactly this means for the PCA is not clear, but given the “odd compromise” responsible for the clause, the qualification that constitutional authority must be express should probably not be read literally.⁸²

Department of Defense regulations, which usually take the middle road on the authorization of domestic military force, speak of the inherent authority found in the Constitution, instead of express authority, to safeguard the public order and to keep the government functioning.⁸³ The DOD reads this to confer two specific exceptions to the PCA. The first is emergency authority.⁸⁴ Emergency authority contemplates the use of the military to prevent the loss of life and property in sudden disasters and civil disturbances that surpass the capability of state and local authorities.⁸⁵ The other exception is for the protection of federal property and functions.⁸⁶ Unlike the emergency exception, the exception to protect federal property and functions need not involve a calamitous event but rather a threat to property and functions that are primarily federal.⁸⁷ Of these two types of federal exceptions, the protection of federal functions is more malleable, as federal functions have been defined by the Code to include the mail system and goods involved in interstate commerce.⁸⁸ The exceptions promulgated by the DOD mirror the statutory exceptions in their insistence that states be unable or unwilling to discharge their functions before permitting military intervention.⁸⁹

4. *Immediate Response Authority*

There is yet another emergency exception—immediate response authority—that is said to exist although the historical and legal arguments for it are scant.⁹⁰ It is not found in statutes or in the Constitution because its distinguishing feature lies in the discretionary power temporarily placed in the hands of military commanders. That is, unlike the emergency authority

⁸¹ *Id.* art. IV, § 4.

⁸² Doyle, *supra* note 21, at 34 n.40.

⁸³ 32 C.F.R. § 215.4(c)(1) (2005).

⁸⁴ *Id.* § 215.4(c)(1)(i).

⁸⁵ *Id.*

⁸⁶ *Id.* § 215.4(c)(1)(ii).

⁸⁷ *Id.*

⁸⁸ *See id.* § 215.3(b), (d).

⁸⁹ *See* 32 C.F.R. § 215.4(c) (2005).

⁹⁰ DEPARTMENT OF DEFENSE, DIRECTIVE 3025.1, MILITARY ASSISTANCE TO CIVIL AUTHORITIES para. 4.5 (1997) [hereinafter DOD DIRECTIVE 3025.1].

issued by the President, the decision to utilize military forces to prevent “life or wanton destruction of property” out of necessity falls on military commanders or DOD officials.⁹¹ DOD directives place military law enforcement outside the scope of immediate response power, which primarily deals with disaster relief. However, in civil disturbances where military law enforcement is imminently necessary, the DOD directives permit the appropriate military commanders and DOD officials to take action while simultaneously seeking presidential authorization.⁹²

Immediate response authority was relied upon to respond to the Oklahoma City bombing in 1995, although the military refrained from directly participating in law enforcement activities.⁹³ One notable example that included active military law enforcement was the 1906 San Francisco fire, where federally armed forces were used to stop looting as well as fight fires and protect federal property.⁹⁴ Outside of these, there is little mention of this power in practice.

As an exception to the PCA, the power of immediate response authority seems insignificant due to the availability of state forces, and to the relative speed with which commanders can communicate any emergencies requiring such force.⁹⁵ This relative insignificance is desirable because even periodic reliance on such an exception raises serious concerns about the power of the military over civilian affairs. However, as an exception based purely on the practical need to prevent loss of life and property in situations where extreme exigencies make it necessary, the immediate response exception gets at a common principle underlying the broadly phrased exceptions to the prohibition on active and direct military law enforcement. That principle, as pointed out by several observers, is best expressed by the notion of necessity.⁹⁶ Based on these exceptions, Congress, the President, and Governors have access to essential military law enforcement.

⁹¹ DEPARTMENT OF DEFENSE, DIRECTIVE 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES para. 4.2.2.1 (1994).

⁹² *Id.* at para. 4.2.2.

⁹³ Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, 1997 ARMY LAW. 3, 15.

⁹⁴ *Id.* at 5.

⁹⁵ *Id.* at 7 n.39; 32 C.F.R. § 501.2(a) (2006).

⁹⁶ Winthrop, *supra* note 93, at 4; JENNIFER K. ELSEA, THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES, CONGRESSIONAL RESEARCH SERVICE 2 (2005), available at <http://www.fas.org/sgp/crs/natsec/RS22266.pdf>; Felicetti & Luce, *supra* note 31, at 128.

III. DISASTER RELIEF AND MILITARY LAW ENFORCEMENT

Thus far, the discussion of domestic military use has assumed that the question of whether to use military personnel turns solely on whether there is an exception to the PCA allowing direct law enforcement. Now the focus shifts slightly to a form of direct military participation that does not depend on an exception to the PCA—disaster relief. Disaster relief is by far the most visible domestic function of the military. When the military conducts disaster relief, it does so under the Stafford Act.⁹⁷ Because the Stafford Act does not expressly provide for military law enforcement, any law enforcement activity during a disaster must seek alternative legal grounds. As argued in Part IV.A, there are alternative grounds available—at least in theory, if the chief federal and state executives believe it necessary to use troops.⁹⁸ Nonetheless, the application of the PCA and its exceptions in disaster relief efforts is ripe for confusion. However, before discussing some of the problems of the PCA during disaster relief, it will be helpful to briefly consider the Stafford Act, the statute that authorizes the relief, and two critical components of disaster relief law, the National Guard and the federalism underlying the Stafford Act.

A. Disaster Relief Law: The Stafford Act

The Stafford Act is the primary disaster relief statute authorizing the President to deploy the military for disaster relief upon the request of a state governor.⁹⁹ Under the Stafford Act, the military assists and supplements the work of local and state officials in times of disaster and emergencies. Although sometimes used interchangeably, disasters and emergencies are distinguished in the statute and may trigger different types of assistance. Declarations of major disasters and emergencies must be initiated by a governor unless a President decides that an emergency implicates interests for which the “United States exercises exclusive or preeminent responsibility,” in which case the President may declare an emergency but not a major disaster.¹⁰⁰ Major disasters are defined as natural catastrophes, or any catastrophes that result in a fire, flood, or explosion.¹⁰¹ Emergency

⁹⁷ 42 U.S.C. § 5121 (2005).

⁹⁸ See discussion *infra* Part IV.A.

⁹⁹ 42 U.S.C. §§ 5170 (declaring major disaster), 5191 (declaring emergency).

¹⁰⁰ *Id.* § 5191(b).

¹⁰¹ 44 C.F.R. § 206.2(17) (2006).

indicates any event necessitating federal intervention to save lives, protect property and the public health, or to avert a catastrophe.¹⁰²

No difference between the two exists with respect to the use of federal troops, whose essential assistance the Stafford Act limits to ten days.¹⁰³ Pursuant to the Act, the military may be called to perform a range of tasks. There are provisions for road clearing, debris removal, search and rescue missions, logistical advice, food and medical supplies, and for shelter.¹⁰⁴ However, the Act does not enable the military to restore law and order by arrests and seizures, nor by any other direct law enforcement methods unless those actions happen to consist of a military purpose like guarding military bases.¹⁰⁵ While deployed the troops remain under the normal chain of command, with the President as the Commander in Chief, although the regulations obviously insist on the coordination of state and local responders.¹⁰⁶

For both declarations, state resources must be found inadequate to deal with or avert the threat posed by the catastrophe. Consequently, governors must describe and execute the state emergency plan in order to assess the shortcomings for which federal assistance is necessary.¹⁰⁷

Troops deployed under the Stafford Act provide logistical and humanitarian relief, but questions of policing disaster stricken areas are never

¹⁰² *Id.* Aside from procedural and definitional distinctions, emergencies and disasters trigger different types of assistance. See 42 U.S.C. §§ 5170a, 5192.

¹⁰³ 42 U.S.C. § 5170b(c).

¹⁰⁴ *Id.* §§ 5170b(a)(3), 5192(a)(3).

¹⁰⁵ DOD DIRECTIVE 5525.5 para. E2.1.4 (1986). The military purpose doctrine is not an exception to the PCA because actions undertaken for a valid military purpose fall outside the scope of the purpose of the PCA to prohibit military enforcement of civilian laws. *People v. Burden*, 303 N.W.2d 444, 447 (Mich. 1981); Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 124 (1975). Any benefits provided to civilian law enforcement pursuant to a military purpose are said to be incidental to the primary purpose. *Id.* at 124–26. That said, the obvious question for the courts, which generally arises when military actions provide law enforcement benefits, is what constitutes a valid military purpose? The answer given by courts escapes consistency. See Doyle, *supra* note 21, at 49–51. Stricter courts demand a close nexus between the stated purpose and the law enforcement activity, while others settle for a mere relation between the two. *Id.* Notably, these cases arise in activities like undercover drug operations and routine criminal investigations. The working of this exception in the context of a large-scale disaster relief effort is not covered by the cases.

¹⁰⁶ 44 C.F.R. § 206.3 (2005).

¹⁰⁷ 42 U.S.C. §§ 5170, 5191(a) (2000).

too far off or entirely avoidable.¹⁰⁸ Because their humanitarian role forces them into direct contact with civilians, the military's presence walks a fine line between maintaining order and providing relief.¹⁰⁹ Normally, no such line exists for the National Guard, which significantly eases the military burden in terms of disaster response, especially in the Guard's ability to provide security. Yet, despite the PCA's general inapplicability to the Guard, the PCA plays a large and perhaps unhelpful role in the utilization of the Guard.

B. *The National Guard*

Notwithstanding the important role of the military, the bulk of disaster relief work generally falls to the National Guard.¹¹⁰ These units wear the same uniform as Army or Air Force personnel¹¹¹ but generally operate without the restrictions of the Posse Comitatus Act.¹¹² The PCA applies to

¹⁰⁸ See Thomas R. Lujan, *Legal Aspects of Domestic Employment of the Army*, 27 PARAMETERS 82 (1997), available at <http://carlisle-www.army.mil/usawc/Parameters/97autumn/lujan.htm>.

¹⁰⁹ *Id.*

¹¹⁰ See Mark Sappenfield, *Katrina Poses Key Test for Stretched National Guard*, CHRISTIAN SCI. MONITOR, Sept. 2, 2005, at 2 (reporting on the traditional role of the National Guard and its role in Hurricane Katrina). The author also briefly describes the tension between this traditional role and its increasing involvement in foreign missions and wars. *Id.* For an article discussing this tension and its impact on retaining Guard members and reserves, see Cunningham, *supra* note 29, at 712–13.

¹¹¹ Laurent Belsie, *US Forces Bring Hurricane Relief in Big Amounts*, CHRISTIAN SCI. MONITOR, Sept. 1, 1992, at 1 (mentioning the identical uniforms of both forces in the response efforts after Hurricane Hugo); Rudy Abramson, *U.S. Again Looks to Reservists*, L.A. TIMES, Aug. 23, 1990, at A1. During hearings on the government response to Hurricane Katrina, Senator John Warner, a strong advocate of reexamining the Posse Comitatus Act, used the fact of identical uniforms to remark that civilians could not tell who was enforcing the law, suggesting that it might not make a practical difference in terms of civilian impressions. *Hurricane Katrina: The Roles of The Department of Homeland Security and Federal Emergency Management Agency Leadership, Panel I of a Hearing of the Senate Homeland Security and Governmental Affairs Committee*, 109th Cong. (2006) (statement of Sen. John Warner, Chairman, Comm. on Homeland Security and Governmental Affairs).

¹¹² *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999) (“The Act does not apply to members of the National Guard unless they have been called into ‘federal service.’ Until called into such service, members of the National Guard remain state, rather than federal officers.”); *United States v. Hutchings*, 127 F.3d 1255, 1257–58 (10th Cir. 1997) (holding the same); *United States v. Benish*, 5 F.3d 20, 25 (3d Cir. 1993) (holding the same and stating that Congress intended to give the National Guard broad power to enforce state laws).

the National Guard only if federalized,¹¹³ thereby bringing the Guard under the military's command and control.¹¹⁴ In most disasters, the Guard serves as a state militia unrestricted by the statutes and regulations against military law enforcement. For this and other reasons, like their geographical proximity to and knowledge of the affected areas, Guard units are especially useful in disaster relief efforts, often taking the lead role on the ground.

The dual status of the National Guard is a special feature that also presents some unique problems. Because Guard units are generally considered the first line of defense in disasters, their ability to maintain law and order as well as provide relief is invaluable to states.¹¹⁵ If a major disaster or emergency declaration requires the use of military personnel, that state's Guard units are also attractive as federal troops for logistical, administrative, and policy reasons.¹¹⁶

Federalizing such units, however, means bringing them within the scope of the PCA, and where maintaining law and order is an issue, Governors hate to give up this component of the state's disaster response.¹¹⁷ By its

¹¹³ *Gilbert*, 165 F.3d at 473.

¹¹⁴ *Perpich v. Dep't of Def.*, 496 U.S. 334, 345 (1990). In *Perpich*, the United States Supreme Court upheld the power of Congress to enact a statute providing for the federalizing of state Guards without the consent of the State Governor, even during times of peace, for training abroad. *Id.* at 335.

¹¹⁵ See, e.g., Paul Purpura, *Bush Orders 7,200 Troops to Join N.O. Area Effort*, TIMES-PICAYUNE (NEW ORLEANS), Sept. 4, 2005 (describing the presence of the National Guard during Hurricane Katrina); Belsie, *supra* note 111, at 1. The fallout from the Guard's failure or inability to provide relief and maintain order in New Orleans immediately after Hurricane Katrina underscores its importance as a first responder. Editorial, *Unprepared*, WASH. POST, Sept. 5, 2005, at A30.

¹¹⁶ Lipton et al., *supra* note 66. Besides faster deployment, the military may want a uniform command structure over Guard and active-duty forces, which also gives the executive branch better control of the costs of disaster relief. See generally *Why Deploy Guard to Airports?*, ORLANDO SENTINEL (FLORIDA), Sept. 28, 2001, at A9 (discussing costs); Katherine McIntire Peters, *Defending U.S.*, GOV'T EXECUTIVE, June 2000, at 37–38 (discussing control and command). See *News: Live Update from Los Angeles—Firemen Exhausted* (CNN television broadcast May 1, 1992), for an illustration of an emergency that led to federalizing state Guard units.

¹¹⁷ See, e.g., *Live From: Rescuers Encounter Victims Who Want to Stay in New Orleans. President and Laura Bush Visit Emergency Operations Center in Baton Rouge* (CNN television broadcast Sept. 5, 2005). In that broadcast, the reporter from Louisiana had this to say:

Now, one of the reasons that there was a falling out between the president and the governor is that the White House really wanted to federalize the National Guard. That would have meant that they would have been under the military's command.

prohibition on military law enforcement, the PCA certainly complicates federal and state conflicts over control of the Guard. Traditionally, these conflicts arose in the context of foreign missions, or orders to train outside of the state.¹¹⁸ Therefore, analysis of the conflict has tried to balance state demands and needs with national prerogatives.¹¹⁹ According to the United States Supreme Court, a Governor may not prohibit federalization unless facing an emergency that requires the Guard units in question.¹²⁰ Apparently, this power to reject the federalization of state troops includes times when federalization serves the purpose of disaster relief for the home state.¹²¹ As happened in Hurricane Katrina, the tradeoff, unlike the traditional national-versus-local conflict, is between two similar “local” interests. Federal officials might prefer a unified command structure for efficient and effective disaster relief while state executives want the Guard to retain the ability to maintain order and provide security.¹²² Because the decision of whether to federalize troops is complicated enough for state and federal executives, the

The governor did not want that. She wanted to be able to use them as more of a law enforcement arm to try to restore order, especially in the streets of New Orleans, where there were reports that gangs were riding around on the backs of trucks with AK-47s and rifles, that they were shooting at police officers. She wanted to make sure that she had control over them in order to help restore order.

The White House, on the other hand, felt that it was necessary for them to be in charge of the National Guard in order to consolidate and coordinate the command of security. So that was their focus.

Id.

¹¹⁸ See *Perpich*, 496 U.S. at 336 (dealing with whether Guard units could be ordered to train abroad in peacetime without a State Governor’s consent).

¹¹⁹ *Id.* at 340–43 (analyzing the conflict in terms of local versus national interest); Patrick Todd Mullins, Note, *The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. 328, 340–46 (1988) (discussing the historical and legislative tensions in the use of the National Guard for state and national missions). This balancing of interests fails to explain the dilemma where both federal and state officials seek Guard members to respond to the same disaster; both are calling the Guard for a substantially similar or non-conflicting purpose.

¹²⁰ *Perpich v. Dep’t of Defense*, 496 U.S. 344, 350–51 (1990). In ruling that the President may send Guard members abroad to train without a Governor’s consent, the Court noted that federalization could still be refused if Guard members were needed for state emergencies or disasters. *Id.*

¹²¹ Jim VandeHei, *Officials Deal with Political Fallout by Pointing Fingers*, WASH. POST, Sept. 5, 2005, at A17.

¹²² See *supra* note 115. For a brief but interesting discussion of centralizing disaster response from a law and economics perspective, visit Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/10/federalism_econ.html#c070302 (Oct. 9, 2005, 07:30 CST). Political motives may also be a factor, but there is little proof that this affects the decision to request and approve assistance.

PCA creates a rather artificial distinction between the same units. One solution would be to exempt federalized Guards but this would mean having two different laws apply to military personnel under the same command.¹²³ A more comprehensive solution would be to clarify the operation of the PCA in a disaster.¹²⁴

The tension found throughout such conflicts has naturally led to questions about the larger place of federalism in disaster relief. As argued below, proponents of strengthening the hand of the President misunderstand the nature of the federalism in the Stafford Act.

¹²³ See, e.g., Martin Matishak, *Pentagon Asks Lawmakers for Greater Authority over Guard, Reserve*, HOMELAND DEFENSE WATCH, Apr. 24, 2006 (telling of Pentagon's request that dual-capacity Guard officers remain exempt from the PCA at all times). The issue of who should ultimately control the National Guard in a disaster is beyond the scope of this Note. On that topic see the traditional debate in John G. Kester, *State Governors and the Federal National Guard*, 11 HARV. J.L. & PUB. POL'Y 177, 181 (1988), which suggests that ultimate control rests with the federal government. But the question over the Guard should not be confused with the question of who should trigger the provisions of the Stafford Act, which is addressed in Part III.C.

¹²⁴ See *infra* notes 187–95 and accompanying text.

C. Federalism and Disaster Relief

The Stafford Act shares an important feature with many laws governing military assistance.¹²⁵ The provisions for military use under the Stafford Act are state-triggered. This relationship between federal and state authorities has come under review by key executive officials.¹²⁶ Thus, the issue of federalism underscores the debate about the legality and desirability of military support in response to a disaster.

Disaster relief and response falls largely under the purview of governors.¹²⁷ Federal law governing disaster response efforts requires state governments to assess the damage or potential damage and to determine the nature of the federal response required to supplement state resources.¹²⁸ Weakening or circumventing the federalism inherent in disaster response laws would probably not result in significant benefits, but it most likely would confuse or cause unnecessary conflicts between state and federal actors. The requirement that a state governor request federal assets and personnel in response to an overwhelming disaster serves an important function but does not significantly hamper the ability of the military to prepare and respond if needed. The state-trigger provisions are important in practice mostly because of what they require states to do,¹²⁹ not because of what they prohibit the federal government from doing.

¹²⁵ See 42 U.S.C. § 5170 (2000) (mandating that federal intervention warranted for natural disasters beyond state capabilities); *id.* § 5191(a) (mandating that federal intervention in emergencies “shall be based on a finding that the situation . . . is beyond the capabilities” of state and local governments); 10 U.S.C. § 331 (2000) (authorizing federal intervention to protect state functions upon a state’s request); *id.* § 333 (providing for military suppression of domestic violence and enforcement of civil rights if states are unable, fail, or refuse to do so); 32 C.F.R. § 501.1(a) (2006) (acknowledging states as having primary responsibility for protection of life and property, and authorizing military law enforcement where states “have utilized all of their own forces and are unable to control the situation, or when the situation is beyond the capabilities of State or local civil authorities, or when State and local civil authorities will not take appropriate action”); *id.* § 215.4 (2004) (reiterating the same for the deployment of troops in civil disturbances).

¹²⁶ Robert Burns, *U.S. Looks at Role for Military; Some Want to Change Law to Permit Using Soldiers in Disasters*, CHI. SUN-TIMES, Sept. 18, 2005, at 15A.

¹²⁷ See *supra* Part III.A.

¹²⁸ See *infra* note 129 and accompanying text.

¹²⁹ Under the Stafford Act, state governors determine “that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.” 42 U.S.C. §§ 5170, 5191(a) (2004). A request based on such a determination must be accompanied by the execution of the state’s emergency plans and information with regard to the state resources employed or to be employed in disaster relief. *Id.* Pursuant to regulations implementing the Act, a Governor must also identify

In any given year, the President declares over fifty emergencies and major disasters upon the request of state governors,¹³⁰ which range from snowstorms affecting a few counties to hurricanes that devastate coastlines across state boundaries. Requests reviewed by FEMA for approval preceded each of these declarations.¹³¹ In that sense, the Stafford Act's provisions for state requests function like an application for federal assistance rather than a wall of gubernatorial authority.¹³² Additionally, the information provided by states and the execution of state emergency plans serve a valuable role to the federal government. For example, such requests identify affected areas by name and list the state resources deployed in the response, which saves federal agencies time and avoids redundancy.

Although no lawmaker has suggested the wholesale abandonment of this process, several have wondered publicly whether the Department of Defense should lead response efforts in disasters like Hurricane Katrina.¹³³ Presumably, enabling federal responders to act without a governor's invitation would remove a significant burden from the military, but this

the areas affected or likely to be affected because of the disaster, and "the type and extent of federal aid required." *Id.* For a recent example of such a request, see Letter from Kathleen Babineaux Blanco, Governor, State of Louisiana, to George W. Bush, President, United State of America (Aug. 28, 2005), available at <http://69.2.43.89/Disaster%20Relief%20Request.pdf>.

¹³⁰ *An Interview with Assistant Secretary of Defense for Homeland Defense*, JOINT FORCE Q., Jan. 1, 2006, at 10, 14 [hereinafter *Assistant Secretary Interview*].

¹³¹ *Id.* at 14–15.

¹³² As such, the scope of FEMA's discretionary power has been subject to litigation. As an agency, FEMA's actions are reviewable under the Administrative Procedure Act (APA). *Kansas ex rel. Hayden v. United States*, 748 F. Supp. 797, 800 (D. Kan. 1990) (citing 5 U.S.C. § 701(b)(1) (2004)). However, the APA shields the discretionary functions of an agency from judicial review. *Id.* In *Kansas ex rel. Hayden*, the court refused to review the denial by the President of a Governor's "major disaster" request, although it agreed to hear the issue of whether FEMA's acting director had unilaterally denied the Governor. *Id.* at 803–04. FEMA may not unilaterally deny a Governor's emergency or major disaster request under the Stafford Act, *id.* at 801, but the agency's administration of disaster relief is generally not up for review. *City of San Bruno v. FEMA*, 181 F. Supp. 2d 1010, 1016 (N.D. Cal. 2001) (granting summary judgment for lack of jurisdiction over FEMA's resource allocation); see also *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988) (defining the concept of discretion). But see *United Power Ass'n v. FEMA*, No. A2-99-180, 2001 U.S. Dist. LEXIS 12922, at *3–4 (D.N.D. Aug. 14, 2001) (finding that the Stafford Act precludes review of discretionary functions, not constitutional claims).

¹³³ Letter from Sen. John Warner, Chairman, Armed Forces Comm., to Donald Rumsfeld, Secretary of Defense (Sept. 14, 2005) (on file with author) (urging greater role for the military in large-scale disasters); *Assistant Secretary Interview*, *supra* note 130, at 14–15; Jim VandeHei & Josh White, *Bush Urges Shift in Relief Responsibilities*, WASH. POST, Sept. 26, 2005, at A12.

presumption should not be given too much weight for several reasons. The first reason is that while this change in leadership would not be merely superficial because it would greatly enlarge the DOD's domestic role,¹³⁴ it is not a necessary vehicle for upgrading military preparation and readiness. According to testimony from military leaders, the state request requirement was not itself a significant burden on preparedness and capacity to respond during Hurricane Katrina.¹³⁵ Federalism does not preclude preparation or better coordination of military resources among federal agencies nor with states.¹³⁶ To the extent the DOD anticipates the necessity of large-scale military commitment in future scenarios, it may prepare and build capacity as if it will be called.¹³⁷

While uncertain to produce significant improvements in the military's operational capacity,¹³⁸ designating the DOD as lead agency would certainly

¹³⁴ See *infra* note 161 for a cursory description of DOD's current role. While a discussion of the relationship between the various federal-state agencies and the DOD goes beyond the scope of this Note, the DOD's current role consists of supporting other federal agencies called lead agencies, like FEMA, that exist primarily to assist local and state authorities. See Brian Kamoie, *The National Response Plan: A New Framework for Homeland Security, Public Health, and Bioterrorism Response*, 38 J. HEALTH L. 287, 290–300 (2005), for an overview of the current system. For relevant parts of the actual plan, see DEPARTMENT OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN 15–45, 91–94 (2004).

¹³⁵ Although military personnel did not receive orders to deploy until three days after Hurricane Katrina made landfall, nothing prevented the military from anticipating a request to provide assistance. See *Hurricane Katrina and the Defense Department Response, Panel I of a Hearing of the Senate Homeland Security and Governmental Affairs Committee*, 109th Cong. (2006) [hereinafter *Katrina Hearing*] (statement of Paul McHale, Assistant Secretary of Defense, Homeland Defense).

¹³⁶ See Ernest B. Abbott, *Homeland Security in the 21st Century: New Inroads on the State Police Power*, 36 URB. LAW. 837, 838–41 (2004) (noting the considerable flexibility of the federal government in disaster response within the bounds of federalism); William C. Banks, *The Normalization of Homeland Security After September 11: The Role of the Military in Counterterrorism Preparedness and Response*, 64 LA. L. REV. 735, 774–75 (2004) (stressing the need for better utilization of existing powers).

¹³⁷ See STEVE BOWMAN ET AL., HURRICANE KATRINA: DOD DISASTER RESPONSE, CONGRESSIONAL RESEARCH SERVICE 13 (2005), available at <http://www.fas.org/sgp/crs/natsec/RL33095.pdf> (acknowledging the military's ability to anticipate disaster response missions).

¹³⁸ Improving and clarifying the relationship between the federal agencies, instead of creating another lead agency, seems more urgent. See *id.* (counseling Congress to review the Department of Homeland Security's internal procedures that create unnecessary delay after requests for assistance); *Katrina Hearing*, *supra* note 135 (statement of Sen. Joseph I. Lieberman, Ranking Member, Homeland Security and Governmental Affairs Comm.) (identifying confusion and sluggishness between the agencies in the failure to execute the National Response Plan after Hurricane Katrina);

raise questions about how to determine when the DOD should take the lead. Obviously, the DOD would not take charge during every snowstorm and flood. The question then is how disastrous must a disaster be before the DOD takes over the role of state and local authorities. Stating that the DOD would become lead agency only when a disaster overwhelms state or local resources merely begs the question currently answered by initially giving state officials the task of determining when their responders and resources are or would be overwhelmed.

Asking states to determine when a disaster or emergency overwhelms their resources is sensible as state authorities know the resources available to them and are therefore likely to have a better picture of what state responders can handle.¹³⁹ If states would continue this role with the creation of another lead agency, the question of how to determine when to take the lead would be answered; however, that system would look similar to the one in place today.¹⁴⁰ The major difference would be that after a state requests federal assistance, the DOD would displace another federal agency in leading the disaster response.¹⁴¹ On the other hand, if the DOD, in addition to being a lead agency, also initially determines if a looming disaster warrants intervention, the decision-making process becomes needlessly convoluted. Rather than strengthening the hand of the President by weakening the inherent federalism, proponents of more effective disaster relief should seek clarity in the law governing the military response.

IV. MILITARY NEED FOR CLARITY, NOT POWER

The statutory and regulatory framework that governs military law enforcement portrays the PCA as primarily concerned with limiting direct military participation in traditional police functions like arrests and seizures

Banks, *supra* note 136, at 741–44, 750–57, 770–76 (examining the various agencies involved in disasters and emergencies and discussing the questions raised by their proliferation).

¹³⁹ This is important because one goal of the Stafford Act is to encourage states to monitor and develop their disaster response systems. 42 U.S.C. § 5121(b)(2) (2000) (“encouraging the development of comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations by the States and by local governments”); *see also* 44 C.F.R. § 201.1(b) (2005) (“The purpose of mitigation planning is for State . . . governments to identify the natural hazards that impact them, to identify actions and activities to reduce any losses from those hazards, and to establish a coordinated process to implement the plan, taking advantage of a wide range of resources.”).

¹⁴⁰ *See infra* note 161 and accompanying text.

¹⁴¹ *See infra* note 161. This bifurcation of lead agencies under the Stafford Act would further require the determination of when the DOD would displace DHS’s FEMA branch.

where local and state authorities possess law enforcement capacity.¹⁴² Even critics who generally believe the spirit and letter of the PCA warrants a broader application¹⁴³ concede that concerns with military policing decrease where state authorities are unable to discharge their police power. This situation commonly arises amidst major disasters and emergencies.¹⁴⁴

Such commentators are willing to ease the restriction on military policing because of two limiting factors.¹⁴⁵ First, military involvement must be necessary for the preservation of life and property. Second, the policing is limited in scope and duration by the disaster or emergency necessitating a military response. These two factors are fundamental to current exceptions, and are dealt with more concretely in the following section. Section B follows with some of the problems in applying the PCA during disaster response, while Section C discusses problems with the Insurrection Act in the context of disaster relief.

A. The Power to Use the Military when Necessary

Given the structure of the PCA, which prohibits military law enforcement not provided for by the Constitution or by statute, application of exceptions to the PCA is just as significant as the rule itself. That is, the broad language of the exceptions to the PCA gives the various officials involved in the decision-making process a great deal of discretion.¹⁴⁶ In a disaster on the scale of Hurricane Katrina, state and federal officials have enough leeway to deploy military personnel to restore order if the need should arise. The first, and most obvious, manner in which this can happen is by a request from the governor of the affected state declaring the need for military law enforcement under the Insurrection Act, as was the case in St.

¹⁴² See 10 U.S.C. §§ 371–382 (2000). Sections 371–382 are notable because they establish the outer limits of permissible military support in the prosecution of routine criminal activity. See *id.* While a number of commentators criticize the high level of military intervention authorized, most of the criticism is directed against military involvement in routine peacekeeping activities, and in localized events. See, e.g., David B. Kopel and Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619, 619, 624–38 (1997) (criticizing the war on drugs and the role of the federal government in Waco).

¹⁴³ See *supra* notes 27–36 and accompanying text.

¹⁴⁴ See Hammond, *supra* note 12, at 983.

¹⁴⁵ *Id.*

¹⁴⁶ See *Laird v. Tatum*, 408 U.S. 1, 3–5 (1972) (holding that the use of the military under the Insurrection Act depends on the discretionary power of state and federal executives); *Bergman v. United States*, 565 F. Supp. 1353, 1401–03 (W.D. Mich. 1983) (discussing the discretionary power of the President under the Insurrection Act).

Croix after Hurricane Hugo.¹⁴⁷ Such an exception was invoked even in the context of a non-disaster, where local and state officials had largely restored order by the time military soldiers arrived.¹⁴⁸

Absent a request from the state executive or legislature, the President may rely on the Insurrection Act, or on the powers said to inhere in the Constitution, to authorize military law enforcement. Presidents Eisenhower and Kennedy enforced federal desegregation laws without a state request.¹⁴⁹ Although this was due to the unwillingness of those states to carry out federal laws, nothing in the statute requires resistance. The mere inability to enforce protections or rights under the Constitution or federal law suffices. While the limits of this power have not been tested,¹⁵⁰ looting and violence in the context of a disaster appears to fall within the ambit of the Insurrection Act.¹⁵¹ Even without explicit statutory authority, DOD regulations provide enough cover for a President to act in the above situation.¹⁵² These regulations identify a constitutional exception to the PCA in emergencies where states are unable to prevent the loss of life and property.¹⁵³ With regard to both statutory and constitutional powers, the real question is one of necessity. In the ordinary course of events, state or local forces may be reasonably expected to handle the contingency, and direct and active military law enforcement will not be necessary.

As for the constitutionally-based duty to protect federal property and functions, the authority flowing from it appears more circumscribed, at least with regard to federal property.¹⁵⁴ However, some authors suggest that the federal functions clause might be read quite broadly in light of the growth of

¹⁴⁷ Schmalz, *supra* note 65; *see also* Exec. Order No. 12,690, 54 Fed. Reg. 39,153 (Sept. 20, 1989) (ordering troops to the Virgin Islands to restore law and order under the Insurrection Act).

¹⁴⁸ CURRIER, *supra* note 11, at 12; *see also* Exec. Order No. 12,804, 57 Fed. Reg. 19,361 (May 1, 1992).

¹⁴⁹ *See Bergman*, 565 F. Supp. at 1402.

¹⁵⁰ Doyle, *supra* note 21, at 37.

¹⁵¹ Because the Insurrection Act gives the President a great deal of discretion, it is not clear at what point civil unrest becomes subject to military coercion. However, in a disaster where state and local authorities have been overwhelmed or incapacitated, even lower levels of unrest might support invocation of the Act. *Cf.* 32 C.F.R. § 215.4(c)(1)(i) (2005) (authorizing military law enforcement when “disasters, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situations”).

¹⁵² *Id.* §§ 215.1–215.5.

¹⁵³ *Id.* § 215.4(c)(1)(i) (emergency authority of the federal government).

¹⁵⁴ *See id.* § 215.3(b) (“property . . . owned, leased, possessed, or occupied by the Federal Government”).

federal functions in modern times.¹⁵⁵ The regulatory language allowing the federal government the ability to protect, by force if necessary, “any function . . . carried out under the laws of the United States”¹⁵⁶ does indeed leave a lot of room for creative interpretations. This opportunity has not gone unnoticed by executive branch officials.¹⁵⁷

B. *The Need for Clarification*

Because of the statutory and constitutional exceptions to the PCA, critics of giving the military greater roles in disasters like Hurricane Katrina argue that the PCA poses no great obstacle to the use of military equipment and personnel in such circumstances.¹⁵⁸ Undoubtedly, where there is political will, the law supports the use of the military for everything from debris removal to stopping looters. Given the significant number of exceptions to the PCA and the unlikely chance of successful prosecution of its violators, the PCA functions more like a policy than a criminal law.¹⁵⁹ While military commanders and guidelines continue to observe this policy in conducting civilian missions, the law governing armed forces could use clarification.

For example, after Hurricane Andrew hit Florida, President Clinton deployed a Joint Task Force under the Stafford Act.¹⁶⁰ Because the Stafford Act contains no exceptions to the PCA’s proscriptions, the military’s mission was to support FEMA’s relief work,¹⁶¹ which does not include law

¹⁵⁵ CRAIG T. TREBILCOCK, CTR. FOR STRATEGIC & INT’L STUDIES, POSSE COMITATUS—HAS THE POSSE OUTLIVED ITS PURPOSE? 4 (2000), <http://www.csis.org/media/csis/pubs/trebilcock.pdf>; Yoo, *supra* note 6. Cf. Hammond, *supra* note 12, at 968–69 (recognizing the ambiguity of the notion but doubting whether courts would uphold the expansive power).

¹⁵⁶ 32 C.F.R. § 215.3(d) (2005).

¹⁵⁷ Lipton et al., *supra* note 66, at A22 (reporting Attorney General Gonzalez’s advice to DOJ lawyers to creatively interpret federal laws like anti-carjacking statutes to assist local authorities).

¹⁵⁸ Yoo, *supra* note 6.

¹⁵⁹ Felicetti & Luce, *supra* note 31, at 163; Hammond, *supra* note 12, at 960. Hammond sensibly seeks to reconstitute the PCA under Title 10, which governs the military, from its current home under Title 18, which deals with “Crimes and Criminal Procedure.” *Id.* at 981.

¹⁶⁰ John J. Copelan, Jr. & Steven A. Lamb, *Disaster Law and Hurricane Andrew—Government Lawyers Leading the Way to Recovery*, 27 URB. LAW. 29, 33–35 (1995).

¹⁶¹ The Federal Emergency Management Agency (FEMA) is responsible for “all functions and authorities prescribed” by the Stafford Act. 6 U.S.C. § 317(a)(1) (Supp. 2003). FEMA became part of the Department of Homeland Security (DHS) in 2002. *Id.* §§ 311–317. A report prepared for Congress explains the relationship as follows:

enforcement. From case law, it is well settled that troops could not arrest, detain, or search individuals, or operate roadblocks.¹⁶² While the difference between arresting suspects and distributing food and water may be clear, some distinctions between passive assistance to law enforcement and active participation are not immediately apparent.¹⁶³ For instance, according to case law and military regulations interpreting the PCA, the Task Force ordered to Florida could not perform traffic control, an activity not immediately evident as prohibited by the PCA.

However, military personnel may control traffic on routes with military convoys because of the military purpose doctrine.¹⁶⁴ The practical operation of the PCA and the military purpose doctrine is not always clear in these situations. It is even less clear when military property and personnel are in close proximity to civilians and disaster victims. Because of the military purpose doctrine, the PCA does not prohibit the military from securing military property and military sites.¹⁶⁵ But it is not uncommon for military sites to be in close proximity or coextensive with shelters or relief centers.¹⁶⁶ In these situations, it is not clear whether the soldiers may secure the facilities because of the uncertain operation of the PCA and the military purpose doctrine during disaster relief. Military leaders faced this situation after Hurricane Andrew and opted to refrain from securing the facilities after

In keeping with the National Response Plan (NRP) and the DOD Joint Doctrine on Homeland Security, DOD civil support is normally provided only when local, state, and other federal resources are "overwhelmed"; and it is requested by the Lead Federal Agency responding to an incident or natural disaster.

....

With the exception of [certain] circumstances . . . unless there is a specific direction from the President, requests for military assistance [typically] must originate from . . . Federal Emergency Management Agency (FEMA), Department of Homeland Security. Requests are submitted to the Office of the Secretary of Defense, where they are evaluated by the ASD(HD) [Assistant Secretary of Defense, Homeland Defense] according to the following criteria: legality, readiness, lethality, risk, cost, and appropriateness.

BOWMAN ET AL., *supra* note 137, at 1–3.

¹⁶² See *supra* notes 35–49 and accompanying text.

¹⁶³ Lujan, *supra* note 108, at 83–84; see also Copelan & Lamb, *supra* note 160, at 38 (warning about the use of troops for traffic control).

¹⁶⁴ Copelan & Lamb, *supra* note 160, at 38; Meeks, *supra* note 105, at 125; see generally *supra* note 105 (citing to sources that discuss the military purpose doctrine).

¹⁶⁵ ELSEA, *supra* note 96, at 4 ("Federal forces would have no authority, for example, to act as traffic controllers or provide security for facilities used in the relief efforts, unless such activities serve a valid military purpose.").

¹⁶⁶ Copelan & Lamb, *supra* note 160, at 38.

a memorandum from the Department of Justice.¹⁶⁷ This uncertainty is a problem because it passes the hard choices onto military commanders without very much guidance.

At other times, the military could easily circumvent the PCA's restrictions by correctly prioritizing their objectives. For example, although the PCA prohibits soldiers from patrolling neighborhoods to stop looting, troops may conduct patrols or sweeps if their primary purpose includes delivery of food and supplies, search and rescue, or any of the other provisions authorized under the Stafford Act. The presence of armed forces is likely to stop looting in either scenario, but missions intended to advance a valid military purpose may produce incidental benefits for law enforcement officials.¹⁶⁸ These fine distinctions may preserve the purity of the PCA, but they are not sound criteria for policymaking. A policy based on the necessity of performing certain functions under the general banner of disaster relief offers greater clarity and sounder criteria by which to regulate the actions of military personnel.

C. Problems with Invoking the Insurrection Act

None of the distinctions between law enforcement and relief work matter if the Insurrection Act is invoked. In response to Hurricane Katrina, federal officials did not think troops could be sent in without confronting situations requiring law enforcement capability.¹⁶⁹ The Insurrection Act was thus tossed around in legal circles and throughout the media. However, authorization of federal troops under the Stafford Act and the Insurrection Act could confuse civilians, local and state authorities, as well as military officials with respect to the role of deployed soldiers.

¹⁶⁷ See, e.g., Lujan, *supra* note 108, at 84 ("Normally, DOD personnel may maintain the security of DOD installations. However, the DOD Life Support Centers established in Florida were inhabited almost entirely by civilians seeking relief. In light of Posse Comitatus, National Guard and local law enforcement personnel, not active-duty soldiers, were tasked to guard these sites."). The outcome would probably have been different if the National Guard had not been available to provide security.

¹⁶⁸ This is termed presence patrol, and was employed in Hurricane Katrina. Nate Guidry, *Sound Spirit Endure*, PITTSBURGH POST-GAZETTE (PENNSYLVANIA), Sept. 11, 2005, at F1 ("The 82nd Airborne . . . was performing what the Army called 'presence patrols,' for both the remaining residents and the criminal element that has emerged during this disaster."); *The NewsHour with Jim Lehrer: Send in the Military* (PBS television broadcast Sept. 27, 2005).

¹⁶⁹ Lipton et al., *supra* note 66, at A22 ("Pentagon and military officials say that no active-duty forces could have been sent into the chaos of New Orleans on Wednesday or Thursday without confronting law-and-order challenges.").

The government's response to the Los Angeles riots shows how confusion may arise under the Insurrection Act in a way relevant to disaster relief efforts. After the riots appeared to exceed the capacity of local authorities, Governor Peter Wilson called in the California National Guard.¹⁷⁰ Under the control of the Governor, the restrictions of the PCA did not apply to the National Guard, and units actively participated in law enforcement activities.¹⁷¹ Concerned with the lack of security and in an attempt to restore law and order, state and local officials requested federal assistance.¹⁷² After the Insurrection Act was invoked, support came in the form of a Joint Task Force consisting of Marines, Army soldiers, and a now "federalized" National Guard.¹⁷³

Generally, when the President federalizes the National Guard, the Guard becomes subject to the provisions of the PCA.¹⁷⁴ This seems to have been on the mind of the General in charge of the federal troops, including the federalized Guard, when he refused many missions based on what appeared to be uncertainties regarding the activities permitted by the PCA.¹⁷⁵ However, since the President committed the troops under a statutory exception to the PCA, no such restrictions existed at the time.¹⁷⁶ Some uncertainty may have been caused by the fact that law and order seemed largely restored by the time federal troops rolled in, leaving the commanders reluctant to actively police civilians during a time of relative calm.¹⁷⁷

¹⁷⁰ Kurt Andrew Schlichter, Comment, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 LOY. L.A. L. REV. 1291, 1292 (1993) (offering a critical analysis of the military's role in domestic disturbance, with emphasis on the riots in Los Angeles).

¹⁷¹ Lujan, *supra* note 108, at 89.

¹⁷² CURRIER, *supra* note 11, at 12.

¹⁷³ *Id.*

¹⁷⁴ See *supra* notes 12–13 and accompanying text.

¹⁷⁵ *Id.*; Lujan, *supra* note 108, at 90.

¹⁷⁶ CURRIER, *supra* note 11, at 10.

¹⁷⁷ Does the exception cease automatically when the extraordinary circumstances cease, or upon the command of the President or federal official? Nothing in recent jurisprudence speaks to this question directly. *But cf.* *Monarch Ins. Co. v. District of Columbia*, 353 F. Supp 1249, 1255 (D.D.C. 1973) ("[T]he decision whether to use troops or the militia (National Guard) in quelling a civil disorder is exclusively within the province of the President."), *aff'd* 497 F.2d 684 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1021 (1974). Although this would seem to suggest that the Insurrection Act exception to the PCA lasts as long as the President determines, the court in *Monarch* was answering whether federal officials were negligent in not invoking the Act. See 32 C.F.R. § 501.6 (2005) ("[C]ivil disturbance operations should end as soon as the necessity therefore [sic] ceases and the normal civil processes can be restored. Determination of the end of the necessity will be made by the Department of the Army."). This regulation seems odd in

Invoking the Insurrection Act in the larger context of a disaster increases the chance for similar confusion. After receiving orders to restore law and order, military commanders may arrive in trouble spots only to find that some sense of order has been restored, either by state and local officials or because the source of the disturbance died down on its own. As happened in the Los Angeles riots, troops and officials might be uncertain about the extent of the support they may provide to civilian law enforcement officials. In other instances, it is not clear how the Act could be properly invoked, as the President must issue a proclamation before invoking the Act notifying "insurgents to disperse and retire peaceably to their abodes within a limited time."¹⁷⁸ This cease-and-disperse notice requirement makes no sense if the objective is military control of traffic or the security of shelters and relief centers, yet the Insurrection Act may not be invoked without such notice.

Besides technical incongruities, the Insurrection Act might prove too much in the context of disaster response. The power flowing to the military from the task of quelling insurrections and mass violence forces it to assume a highly confrontational stance.¹⁷⁹ This position might not be optimal in situations where the need for law and order is coupled with, and secondary to, the need for humanitarian relief. Just because the military might need to manage traffic, direct civilians, or secure relief centers does not mean it should be deployed under a statute more attuned to violent uprisings and widespread efforts to disrupt the operation of law.¹⁸⁰ Even in the worst-case scenario of mass looting and violence, there is a notable difference between restoring order in disaster-stricken areas and enforcing the law after the outbreak of riots like those in Los Angeles, or enforcing the civil rights of black students.¹⁸¹ There, the conditions calling for military law enforcement

that it initially gives objective criteria for ending military operations, but then gives the executive branch sole power to determine when to end operations.

¹⁷⁸ 10 U.S.C. § 334 (2000).

¹⁷⁹ See Schlichter, *supra* note 170, at 1292, 1302–06 (highlighting some of the dangers of the Insurrection Act).

¹⁸⁰ Another reason the Insurrection Act might be inappropriate surfaced in reporting on the stories of the breakdown of law and order. In hindsight, stories of mass violence and disorder appear to have been untrue or exaggerated. Matt Welch, *They Shoot Helicopters, Don't They? How Journalists Spread Rumors During Katrina*, REASON, Dec. 1, 2005, at 16–18 (discussing some of the exaggerations along with how such stories might originate and spread); Jim Dwyer & Christopher Drew, *Fear Exceeded Crime's Reality in New Orleans*, N.Y. TIMES, Sept. 29, 2005, at A1; Christopher Shea, *Up for Grabs: Sociologists Question How Much Looting and Mayhem Really Took Place in New Orleans*, BOSTON GLOBE, Sept. 11, 2005, at E1.

¹⁸¹ Shea, *supra* note 180, at E1, E5 (quoting sociologists and experts on crowds whose work shows clear differences between riot- and disaster-related looting and violence). For a study of crowd behavior, see generally CLARK MCPHAIL, *THE MYTH OF THE MADDING CROWD* (1991).

grew out of discontent with certain policies or practices.¹⁸² Handing out food and water, or providing shelter and medical attention, would not have solved anything. Where disorder is a by-product of disaster, rapid and effective disaster relief may often obviate much of the need for coercive force.

As the name suggests, the Insurrection Act contemplates heavy-handed military tactics in order to quell threats to the legitimacy of state and federal governments.¹⁸³ The primary objective of the military under the Stafford Act is disaster relief.¹⁸⁴ The Insurrection Act pits the military directly against the citizens in a situation where humanitarian relief should take precedence over law enforcement. For these reasons, political officials shy away from invoking the Insurrection Act even when it might be legally permissible,¹⁸⁵ and would find it hard to invoke the Act for the purpose of traffic control or securing shelters of disaster victims.¹⁸⁶ Ironically, by granting the military so much power, the Insurrection Act grants them too little, as it suggests overkill and often fits poorly into primarily disaster relief missions.

V. LAW AND ORDER AS DISASTER RELIEF

The laws governing domestic military use in a disaster give the military, by way of the executive branch, a great deal of power in disasters; yet, that power derives from a patchwork of statutes and regulations. This creates opportunity for confusion and uncertainty in times where there is already an abundance of both. Currently, regulatory, proscriptive, or compulsory activities are outside the scope of the military's disaster response mission.¹⁸⁷ This generally prohibits the military from controlling traffic, securing relief centers, and restoring law and order during civil disturbances.¹⁸⁸ In many disasters, state and local authorities can adequately provide these functions. However, if these authorities prove or appear inadequate, governors should have the power to request traffic control or security services as part of—and

¹⁸² See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 171–72 (1999) (connecting police tactics with unwillingness to comply with the law); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1400–01, 1403 (2005). Nadler explains the Los Angeles riots, and other such urban riots, as fueled by unlawful government actions. *Id.* at 1439–40.

¹⁸³ See *supra* notes 57–70 and accompanying text.

¹⁸⁴ See *supra* notes 99–109 and accompanying text.

¹⁸⁵ The Insurrection Act also carries historical baggage that complicates the decision-making process. See Lipton et al., *supra* note 66, at A22; see also *supra* note 68.

¹⁸⁶ See *supra* notes 161–65 and accompanying text.

¹⁸⁷ See *supra* notes 35–49, 99–109 and accompanying text.

¹⁸⁸ ELSEA, *supra* note 96, at 4; Banks, *supra* note 136, at 760; Copelan & Lamb, *supra* note 160, at 38.

limited to—the overall disaster response. Instead of relying on ill-fitted exceptions and fine distinctions, necessary military activities should fall under the statutory framework of the Stafford Act. This realignment would clarify the rules under which the military operates during emergencies and disasters.¹⁸⁹

A. Disaster Relief Exceptions to the PCA

The provision for military assistance would not automatically activate after emergency or major disaster declarations, but would work much like other forms of military assistance under the Stafford Act. When governors need the military to remove debris or distribute food and medical supplies, they specifically include it in the request for disaster relief and emergency declarations.¹⁹⁰ The governor could also request traffic control or security when disasters surpass or reasonably threaten to surpass the state's capacity. The military's primary focus remains humanitarian relief, but providing relief may necessitate the exercise of power that is regulatory, proscriptive, or compulsory in nature. For instance, state executives might request delivery of food and medical supplies or removal of debris in disasters without the ability to provide security for all affected victims or military personnel.

This can happen if officials request active-duty forces before enough National Guard members are available to them, or the Guard is federalized, unable, or otherwise occupied. Under these conditions, the military may be reluctant to take on relief missions where it foresees a high probability of having to set up road blocks, control traffic, or restore order.¹⁹¹ Scenarios like

¹⁸⁹ Ultimately, it would be clearer for civilian and military leaders if the exceptions were incorporated into the Posse Comitatus Act. For one such proposal, see Hammond, *supra* note 12, at 980–81. But this is beyond the scope of this Note, which only addresses potential exceptions in major disasters and emergencies.

¹⁹⁰ Title 42, § 5170b of the United States Code provides for essential assistance, which includes military debris removal and search and rescue missions. That provision also provides thus:

During the immediate aftermath of an incident which may ultimately qualify for assistance under this subchapter or subchapter IV-A of this chapter, the Governor of the State in which such incident occurred may request the President to direct the Secretary of Defense to utilize the resources of the Department of Defense for the purpose of performing on public and private lands *any emergency work which is made necessary by such incident . . .*

42 U.S.C. § 5170b(c)(1) (2000) (emphasis added).

¹⁹¹ See, e.g., Lipton et al., *supra* note 66, at A22 (“Pentagon and military officials say that no active-duty forces could have been sent . . . without confronting law-and-order challenges.”).

this, which do not always fit easily into the Insurrection Act,¹⁹² could be met by allowing state officials the statutory option of coupling essential law enforcement with the mission. What constitutes essential law enforcement would be determined on a case-by-case basis, but the concept seeks to incorporate two policies. The first policy is that of states and local officials as first responders. The second is the relief-centered nature of the mission. Thus, only where states are unable to adequately provide for the security and safety of disaster victims and responders—and the military's relief mission necessitates the particular form of law enforcement—would the request be appropriate.

B. Posse Comitatus Act's Rationale Revisited

Housing exceptions to the PCA within the Stafford Act certainly would facilitate military law enforcement in certain disasters and emergencies, but it would not greatly expand its current power. This is because the law governing domestic military use already gives a great deal of power to state and federal officials in responding to overwhelming disasters.¹⁹³ Any reluctance on the part of officials to use the military to the extent currently permitted by law reflects traditional unease with military solutions to domestic problems and the concurrent threat to civil liberties. This policy would continue to influence decisions involving the military in domestic affairs. But this policy is not and never has been absolute.¹⁹⁴ Under the disaster exceptions to the PCA, the military already provides disaster relief, a military solution to a domestic problem, because of the need to prevent unnecessary loss of life and property. Moreover, unlike some exceptions to the PCA, the Stafford Act exceptions would be expressly limited in time and

¹⁹² See discussion *supra* notes 161–65 and accompanying text.

¹⁹³ But the practical application of this power is less certain. See Banks, *supra* note 136, at 773–74.

On the issue of whether the military could be deployed without the invitation of state officials, the Office of Legal Counsel, the unit within the Justice Department that provides legal advice to federal agencies, concluded that the federal government had authority to move in even over the objection of local officials.

Lipton et al., *supra* note 66, at A22; see also Yoo, *supra* note 6.

¹⁹⁴ See generally Richard H. Kohn, *Using the Military at Home: Yesterday, Today, and Tomorrow*, 4 CHI. J. INT'L L. 165 (2003) (offering an historical account of domestic military use).

scope.¹⁹⁵ There is no threat of creating a national police force, or of militarizing routine police activities.

Another rationale for the PCA emphasizes that military personnel are trained to win wars and conduct missions against enemies, not to keep the peace. This poses a slightly different objection to incorporating law enforcement into the disaster response effort. Admittedly, combat-oriented training lacks most of the nuances and constitutional safeguards of police training. However, the disaster relief exceptions do not hold out the military as the best option but as the last resort. Arguably, subjecting law enforcement activities to the necessity of providing disaster relief better addresses the problem than the current law, which could authorize military law enforcement independent of the disaster relief effort. At least in the former scenario there would be less uncertainty about the principal goal of any particular mission.

VI. CONCLUSION

Amidst disaster relief, the dual tasks of providing relief and providing security are not always easy to separate. While the Posse Comitatus Act requires this distinction, laws today do not require an absolute separation between the two. This is evidenced by state forces like the National Guard, to which the PCA does not apply, and the various exceptions to the PCA. Considering the ability to piece together various exceptions, executive officials cannot truly say they are powerless to save lives and property during a disaster because of restrictions on the military, even if that response includes law enforcement. However, the work of piecing together the applicable law in times of disaster introduces uncertainty that is unhelpful to the military and civilians. Incorporating exceptions to the PCA into the Stafford Act's provisions for essential assistance is one way the legislature could clarify this area of law and thus possibly improve the delivery of relief and security in catastrophic disasters.

¹⁹⁵ See 42 U.S.C. § 5170b(c) (2000) (limiting the utilization of DOD resources for essential assistance to ten days).